Government of Sarawak v Sami Mousawi-Utama Sdn Bhd (in liquidation)

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24-09-98-III(I)
IAN CHIN J
26 JUNE 1998

Civil Procedure *— Costs — Security for costs — Application for security for costs against company under liquidation — Factors to be considered — Whether security for costs could be ordered when a court-appointed liquidator launches an action — Arbitration Act 1952 s 13(6)(a) — Companies Act 1965 s 351(1)*

The respondent — a company under liquidation — claimed against the applicant, a sum of RM17m for consultation fees under a consultancy service agreement ('the agreement'). The applicant argued that the claim was not bona fide or that it was not a good arguable case because the terms and other provisions in the agreement described the services to be rendered by architects or engineers or surveyors. Since the respondent had not been registered as such under the relevant legislation, it therefore cannot claim the fees prohibited by the legislation. The respondent argued that the services rendered were for consultancy services and not services rendered by architects or engineers or surveyors. The claim for 'consultation fees' was referred for arbitration. Pending the arbitration, the applicant applied for security for costs under s 13(6)(a) of the Arbitration Act 1952 and s 351(1) of the Companies Act 1965 to be furnished by the respondent.

Held, allowing the application with costs:

(1) The matters adverted to in *Keary Developments Ltd v Tarmac Construction Ltd & Anor*, though not exhaustive, should weigh one way or the other regarding the exercise or the discretion to grant security for costs depending on which side of the scale they all add up. It is inaccurate to say that no security for costs could ever be ordered when a court-appointed liquidator launches an action. The fact that the liquidator was court appointed is entirely irrelevant. Security for costs could still be ordered in exceptional circumstances (see pp 826I, 827B, D); *Keary Developments Ltd v Tarmac Construction Ltd & Anor* [1995] 3 All ER 534 followed; *Re Pavelic Investments Pty Ltd* 8 ACLR 417 and *Spiel v Commodity Brokers Australia Pty Ltd (in liq)* (1983) 8 ACLR 410 not followed.

(2) The terms and other provisions in the agreement imposed an obligation to pay professional fees. The facts cast doubt on the prospect of the respondent's successful prosecution of the claim and suggest a high degree of probability that the respondent's claim may fail (see p 828F, I).

(3) The contributors or shareholders of the respondent stand to benefit if the action is successful while remaining unaffected by the consequence of a failed action. On the other hand, the

applicant would not be able to recover any cost if the action should fail. Thus, an order for security for costs will not have the effect of stifling the action and the facts justify the making of the order. Coupled with several other factors considered by the court, the application for security for costs by the applicant was allowed (see p 831E).

[Bahasa Malaysia summary

Penentang — sebuah syarikat di bawah penyelesaian — menuntut terhadap pemohon, sejumlah RM17 juta untuk bayaran perundingan di bawah satu perjanjian perkhidmatan perundingan ('perjanjian tersebut'). Pemohon berhujah bahawa tuntutan tersebut adalah tidak bona fide atau bahawa ia bukan satu kes yang boleh dipertikaikan dengan baik kerana terma-terma dan peruntukan-peruntukan lain di dalam perjanjian tersebut menerangkan bahawa perkhidmatan-perkhidmatan tersebut akan diberikan oleh jurubina atau jurutera atau juruukur. Oleh kerana penentang tidak didaftarkan seperti yang tersebut di bawah perundangan yang relevan, ia tidak boleh menuntut bayaran yang tidak dibenarkan oleh perundangan itu. Penentang berhujah bahawa perkhidmatan-perkhidmatan yang diberikan adalah untuk perkhidmatan-perkhidmatan perundingan dan bukan perkhidmatan-perkhidmatan yang diberikan oleh jurubina atau jurutera atau juruukur. Tuntutan untuk 'bayaran perundingan' dirujuk untuk timbangtara. Sementara menunggu timbangtara, pemohon memohon untuk jaminan kos di bawah s 13(6)(a) Akta Timbangtara 1952 dan s 351(1) Akta Syarikat 1965 untuk disediakan oleh penentang.

Diputuskan, membenarkan permohonan dengan kos:

(1) Perkara-perkara yang dirujuk di dalam *Keary Developments Ltd v Tarmac Construction Ltd & Anor*, walaupun tidak menyeluruh, patut mengambil kira dalam satu satu cara atau sebaliknya tentang pengunaan atau budi bicara untuk memberi jaminan kos bergantung kepada sebelah mana mereka memihak. Adalah tidak tepat untuk menyatakan bahawa jaminan kos tidak boleh diberikan bila penyelesai yang dilantik oleh mahkamah memulakan satu tindakan. Fakta bahawa penyelesai dilantik oleh mahkamah adalah langsung tidak relevan. Jaminan kos masih boleh diperintahkan di dalam keaadaan-keadaan yang tertentu (lihat ms 826I, 827B, D); *Keary Developments Ltd v Tarmac Construction Ltd & Anor* [1995] 3 All ER 534 diikut; *Re Pavelic Investments Pty Ltd* 8 ACLR 417 dan *Spiel v Commodity Brokers Australia Pty Ltd (in liq)* (1983) 8 ACLR 410 tidak diikut.

(2) Terma-terma dan peruntukan-peruntukan lain di dalam perjanjian tersebut mengenakan satu obligasi untuk membayar bayaran profesional. Fakta-fakta menimbulkan keraguan terhadap prospek penentang untuk berjaya dalam tuntutannya dan mencadangkan satu kemungkinan besar bahawa tuntutan penentang mungkin gagal (lihat ms 828F, I).

(3) Pencarum atau pemegang saham penentang akan mendapat manfaat jika tindakan itu berjaya sementara tidak akan terjejas oleh akibat tindakan yang gagal. Sebaliknya, pemohon mungkin tidak akan mendapat apa-apa kos jika tindakan itu gagal. Oleh yang demikian, satu perintah jaminan kos tidak akan mempunyai kesan yang menyekat tindakan dan fakta-fakta memberi justifikasi yang kuat untuk membuat perintah tersebut. Bersama-sama faktor-faktor yang lain yang dipertimbangkan oleh mahkamah, permohonan untuk jaminan kos oleh pemohon dibenarkan (lihat ms 831E).]

Notes

For cases on security for costs, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1338–1369.

Cases referred to

Ananda Trading (S) Pte Ltd v Palmerston Holding Sdn Bhd [1997] 2 CLJ Supp 1 (refd)
Faridah Begum bte Abdullah v Dato Michael Chong [1995] 2 MLJ 404 (refd)
Keary Developments Ltd v Tarmac Construction Ltd & Anor [1995] 3 All ER 534 (folld)
Metalloy Supplies Ltd v MA (UK) Ltd [1997] 1 WLR 1613 (refd)
Pavelic Investments Pty Ltd, Re 8 ACLR 417 (not folld)
Spiel v Commodity Brokers Australia Pty Ltd (in liq) (1983) 8 ACLR 410 (not folld)

Legislation referred to

Arbitration Act 1952 s 13(6)(a)
Architects Act 1967
Companies Act 1965 ss 218(2)(a), 236(3), 351(1)
Quantity Surveyors Act 1967
Registration of Engineers Act 1967

JC Fong (Sarawak State Attorney General Chambers) (*Susan Gau* with him) for the applicant.
Chong Sie Chiang (*Chong Brothers*) for the respondent.

Cur Adv Vult

Ian Chin J:

Introduction

On 17 January 1998, the Government of Sarawak ('the applicant') took out this application for security for costs under s 13(6)(a) of the Arbitration Act 1952, and under s 351(1) of the Companies Act 1965, to be furnished

by Sami Mousawi-Utama Sdn Bhd ('the respondent'), which is under liquidation, in relation to a pending arbitration ('arbitration').

Facts of case

The respondent is in the arbitration proceeding claiming against the applicant a sum of RM17m under a consultancy service agreement made on 26 October 1984 ('the agreement'). The claims asserted by the respondent is for:

> ... outstanding professional fees for the design of Phase II, Phase III and Islamic details and decoration for Phases II and III of Mesjid Negeri Sarawak and Islamic Cultural Centre at Petra Jaya Kuching.

The services that were provided upon which the respondent based its claim were elaborated by the respondent through an affidavit of its liquidator Ng Pyak Yeow, affirmed on 25 March 1998, in these terms:

> ... the consultancy services to be provided by the [respondent] outstanding for the whole project and not just for the phases that are carried out. Appendix A and F to the said agreement specifies that the scope of the consultancy services begins with the preparation of the architectural schematic and outline design drawings and continues right through to the completion of construction.

Datuk JC Fong, the Honourable Sarawak State Attorney General, who appeared as counsel for the applicant, contended that those terms and other provisions in the agreement properly described the services to be rendered by an architect, engineer and surveyor as spelt out in the respective Architects Act 1967, Registration of Engineers Act 1967 and the Quantity Surveyors Act 1967. However, Mr Chong Sie Chiang, learned counsel for the respondent, contended that the services rendered were for consultancy services and not services rendered by architects or engineers or surveyors. The differing view is relevant to the question of whether the respondent has a good arguable case. The applicant contended that the claim is not bona fide or that it is not a good arguable case because the respondent had not been registered as architects or engineers or surveyors under the relevant legislation relating to the three professions and therefore cannot claim the fees such being prohibited by the legislations.

It was a result of the claim by the respondent for 'consultancy fees', a term used by learned counsel for the respondent, that it was referred to arbitration and which resulted in the appointment of three arbitrators who had since commenced preliminary hearings. The retainer fee for the arbitrators was fixed at RM150,000 with a refresher fee of RM12,000 per day. I turn now to the issues.

The contentions

The matters that the court should take into account when deciding whether to order security for costs are set out in *Keary Developments Ltd v Tarmac Construction Ltd & Anor* [1995] 3 All ER 534 at pp 539–540, viz:

> (1) As was established by this court in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273, [1973] QB 609, the court has a

complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumtances. A

(2) The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security (see *Okotcha v Voest Alpine Intertrading GmbH* [1993] BCLC 474 at p 479, per Bingham LJ, with whom Steyn LJ agreed). By making the exercise of discretion under s 726(1) conditional on it being shown that the company is one likely to be unable to pay costs awarded against it, Parliament must have envisaged that the order might be made in respect of a plaintiff company that would find difficulty in providing security (see *Pearson v Naydler* [1977] 3 All ER 531 at pp 536–537, [1977] 1 WLR 899 at p 906, per Megarry V-C). B C

(3) The court must carry out a balancing exercise. On the one hand, it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity (see *Farrer v Lacy-Hartland & Co* (1885) 28 Ch D 482, per Bowen LJ). But will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company (see *Pearson v Naydler* [1977] 3 All ER 531 at p 537, [1977] 1 WLR 899 at p 906). D E

(4) In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure (see *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074 at 1077, [1987] 1 WLR 420 at p 423, per Browne-Wilkinson V-C). In this context, it is relevant to take account of the conduct of the litigation thus far, including any open offer or payment into court, indicative as it may be of the plaintiff's prospects of success. But the court will also be aware of the possibility that an offer or payment may be made in acknowledgment not so much of the prospects of success but of the nuisance value of a claim. F G

(5) The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount (see *Roburn Construction Ltd v William Irwin (South) & Co Ltd* [1991] BCC 726). H

(6) Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence (see *Trident International Freight Services Ltd v Manchester Ship Canal Co* I

A [1990] BCLC 263). In the *Trident* case, there was evidence to show that the company was no longer trading, and that it had previously received support from another company which was a creditor of the plaintiff company and therefore had an interest in the plaintiff's claim continuing; but the judge in that case did not think, on the evidence, that the company could be relied upon to provide further assistance to
B the plaintiff, and that was a finding which, this court held, could not be challenged on appeal.

However, the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers of interested persons. As this is
C likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation (see *Flender Werft AG v Aegean Maritime Ltd* [1990] 2 Lloyd's Rep 27).

Mr Chong appears to me to contend that all those factors are not decisive
D and, for this contention, learned counsel referred to *Spiel v Commodity Brokers Australia Pty Ltd (in liq)* (1983) 8 ACLR 410 at pp 415–416, which says:

> In *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273, Lord Denning MR said (at p 285):
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> E > Turning now to the words of the statute, the important word is 'may'. That gives the judge a discretion whether to order security or not. There is no burden one way or the other. It is a discretion to be exercised in all the circumstances of the case.
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> His Lordship pointed out that the judge 'may' order security, not 'must' order security. At pp 285–286, his Lordship mentioned some matters which
> F counsel had 'helpfully suggested' might be taken into account. As Mitchell J says in *Dictating Machine Centre Pty Ltd v Combe* (1981) 26 SASR 316 (at pp 319–320), his Lordship referred to these matters with approval. But they were merely some matters which might be taken into account. No more. His Lordship said:
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> G > ... such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. Again, it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that too would count. The court
> H > might also consider whether the application for security was being used oppressively — so as to try and stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work.
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> No doubt all of those matters were fit for consideration by the magistrate
> I here. Unfortunately, he has published no reasons. In my opinion, therefore, it is not possible to know on what ground he exercised his discretion against ordering the giving of security. I think we must look at the matter for ourselves using the material which was before the magistrate. Mr Hume specifically and correctly denied that the five matters 'helpfully suggested'

to the Court of Appeal presided over by Lord Denning MR were exhaustive of the matters to be considered here. Indeed, he said that even though the answer to some of them came down against his client's interest, still the magistrate must have fallen into error. For my part, I respectfully adopt all that has been said by the full court, by Mitchell J, by Jacobs J and by Lord Denning MR but I think the chance of the success of the 'insolvent' company to be one factor of great importance. One ground of appeal is that the magistrate failed to give sufficient consideration to the fact that 'on the evidence before him the respondent's action had no reasonable chance of success' [ground 4(iv)]. I simply cannot agree. Each side has an arguable case. The magistrate could have expected, as I expect, that much could turn on the credibility and reliability of the appellant and of Mr Ellis, the manager of the respondent. The appellant says that he instructed the manager of the plaintiff 'to close off all contracts by the close of business on 4 January 1980' (see appellant's affidavit sworn on 19 July 1983, para 4). We know not what Mr Ellis will say. We do know that a debt appears in the books of the company due by 'Mr J Hall'. We know that the appellant is 'Mr J Hall'. We know that the appellant did deal with the respondent. The case may turn on whose evidence of cessation of dealing is accepted. The entries in the respondent's business books are of some evidentiary value. I think that the respondent has an arguable case. I do not think that any of the other matters 'helpfully suggested' to the Court of Appeal either considered alone or together march against the denial of the order for security sought by the appellant. The action is not a sham. There has been no payment into court. The application is not, so far as one may judge, being used oppressively. These considerations may show that the appellant's application should not have been barred by the application of one or more of the 'helpful suggestions'. But that does not mean that an order for security should have been made. There was no conduct of the appellant which militated against his application. I think that to be so even though his benefit obtained under his debenture contributed to the respondent's poverty.

A B C D E F

But these considerations were, in my opinion, insufficient to justify the ordering of security. The fact was that such an order would have produced victory for the appellant without a contest. The respondent would have been prevented from proceeding with an arguable case legitimately instituted. The hardship to creditors produced by such a course would, in my opinion, far outweigh the hardship which possible inability to recover costs may cause the appellant.

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I think it relevant in the exercise of discretion to remember that the claim is really being brought by the liquidator. He is an officer of the court. He has available to him information which reasonably suggests to him that the appellant owes a substantial sum to the respondent. This duty is to take reasonable steps to recover what he can for creditors and shareholders. Moreover, he has a duty to the court. I need not dwell on that duty.

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In my opinion, it would be unjust and inequitable to impose on the respondent the burden of providing security for the appellant's costs. I think that the easy victory which an order for security would produce would cause greater hardship than would the possibility that the appellant will not be able to collect costs ordered in his favour.

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In my view, the matters adverted to in *Keary Developments Ltd v Tarmac Construction Ltd & Anor*, though not exhaustive, should weigh one way or the other regarding the exercise or the discretion depending on which side

of the scale they all add up. They are relevant factors to be taken into account. In so far as *Spiel v Commodity Brokers Australia Pty Ltd (in liq)* appears to decide that because an action by a company in liquidation is really an action by a liquidator, who is an officer of the court, security for costs should not be ordered, I would respectfully decline to follow as such a conclusion would invariably mean that no security for costs could ever be ordered when a court-appointed liquidator launches an action. Furthermore, though the liquidator has the power to commence an action, nevertheless he is not only subject to the control of the court but also subject to the scrutiny of the creditor or contributory (Companies Act 1965, s 236(3)). A liquidator is also subject to directions given by resolutions of the creditors or contributories at a general meeting. Therefore, though appointed by the court, he is nevertheless subject to the wishes of the creditors or contributors. I, therefore, cannot see any thing special in the fact of the liquidator being an officer of the court as weighing against the grant of an order for security. In my view, the fact of the liquidator being court appointed is entirely irrelevant. For the same reason, I would not follow *Re Pavelic Investments Pty Ltd* 8 ACLR 417 where it decides that:

> ... the foundation of the court's decision on this application was that this court should apply what appears to be a rule of practice so inveterate as to be almost a rule of law, namely that the liquidator of a company, appointed by the court, is not required to give security for costs save in very exceptional circumstances.

In any event, it could still be ordered in exceptional circumstances which exist in the present case and which I will advert to when I consider the issue of whether the respondent's claim will be stifled.

The applicant argued that security should be furnished because all the factors when considered and added up weighed in their favour. These factors, contended by Datuk Fong are:

(1) the respondent's claim is not bona fide and bound to fail because it is a claim for fees for services rendered by architects, engineers and surveyors when the respondent was not licensed to render such services as required by the relevant legislation;

(2) the respondent is insolvent;

(3) the applicant did not make any admission of the debt;

(4) there had been no substantial payment into court or an open offer of settlement;

(5) the application is not for the purpose of stifling a valid claim;

(6) the applicant was not responsible for the impecuniosity of the respondent; and

(7) the application was not made at a late stage.

As for (4), there is no dispute that there is no payment into court and no open offer of settlement by the applicant. In fact, the claim when it was first made was denied by the applicant. There is no controversy concerning (7) since it was not argued by the respondent that the application for

security for costs was made late. I turn now to consider the other contentions bearing in mind the balancing exercise which I have to perform to avoid injustice and the other relevant principles stated in *Keary Developments Ltd v Tarmac Construction Ltd & Anor.*

Whether the claim is bona fide?

Mr Chong has submitted that the court should avoid any detailed investigation into the merits of the case where the issues are complex and the final outcome far from clear, citing *Faridah Begum bte Abdullah v Dato Michael Chong* [1995] 2 MLJ 404, unless, learned counsel added, it is plain and obvious, citing *Ananda Trading (S) Pte Ltd v Palmerston Holding Sdn Bhd* [1997] 2 CLJ Supp 1. In so far as the general principle is concerned, there is no quarrel. However, while stating that general principle, Mr Chong had not expounded on why he said the issues in the arbitration are complex. It is not in contention that unless you are registered as architect or engineer or surveyor you cannot practise as such and that means you cannot claim for fees for services rendered as such professionals. What is in issue is whether the claim by the respondent is for those professional fees to which Mr Chong merely submitted that they are not and that the claim is only for 'consultancy services'. While not expressing any definite view which is the proper purview of the arbitrators, it suffices for me to say that it is difficult to argue the express words in Appendix D of the agreement to mean otherwise than what is plainly stated there. I need only reproduce certain part of Appendix D to illustrate how it is plain and obvious that the agreement imposed an obligation to pay such professional fees and that it is for such professional service, viz:

SCHEDULE OF PROFESSIONAL FEES

The fees payable by the client to the consultant for their services shall be as follows:

(a) For the architects — the consultancy and supervision fees payable shall be made in accordance with the Scale of Fees of Lembaga Akitek Malaysia.

(b) For the engineers — the consultancy and supervision fees payable shall be made in accordance with the Scale of Fees of Lembaga Jurutera Malaysia.

(c) For the quantity surveyors — the consultancy and supervision fees payable shall be made in accordance with the Scale of Fees of the Institute of Surveyors.

There is also the letter of the advocate for the respondent dated 14 August 1997 by which the respondent claimed 'professional fees and loss/expenses'. That it is professional fees that the respondent is claiming can also be gathered from a minute of the discussion held on 19 August 1996 in which a senior partner of the respondent asserted a claim for various professional fees. Those facts cast a long shadow on the prospect of the respondent's successful prosecution of the claim and they justify my view that there is a high degree of probability that the claim may fail. This is one of the factors I will take into account.

Whether the respondent is insolvent?

It was said in *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613, which statement I respectfully agree with, that the primary remedy for a party facing a claim by a company in liquidation is an order for security for costs. However, I would add, following *Spiel v Commodity Brokers Australia Pty Ltd (in liq)*, that the discretion whether to grant or not to grant an order for security for costs is unfettered in the sense that the discretion is not subject to anything in the nature of a statutory bias in favour of making an order. But it must also be remembered that Parliament must have envisaged that an order for security for costs may be made against a company that would find difficulty in providing security.

There is no dispute that the respondent is under liquidation but the respondent appears to me to argue that they are not insolvent because they have an asset of RM17m being the claim the respondent is now pursuing against the applicant in the arbitration proceedings. The short answer to that argument is that the claim cannot be a strong one and in fact, as I have found earlier, its bona fide is in doubt thus rendering the asset of RM17m rather illusory. That illusory sum cannot turn the respondent into a solvent company. I have to accept that the respondent is insolvent and it was this inability to pay its debt that was one of the grounds presented to the court for its winding-up.

Was there an admission by the applicant of the debt of RM17m?

It is not in dispute that the Public Works Department had on 27 December 1996 issued a letter to the respondent to inform them that the department was unable to release the sum of RM649,564.64 claimed by the quantity surveyor on the ground that only a sum of RM300,057.61 was due. Mr Chong argued that at the very least there is that sum of RM300,057.61 which the applicant has to pay the respondent and that amount would be sufficient to cover the costs of the arbitration. That letter, far from admitting the sum of RM17m, in fact admitted only of a limited sum, but the claim for that sum would nevertheless have to face the hurdle of the claim not being maintainable since it is for fees for services rendered by persons who are not professionals registered under the said legislation. In any event, the letter went on to say that the amount would be payable to the quantity surveyor instead of to the respondent which put paid to the contention that the respondent would at the very least have that sum to cover the costs.

Is the application for security for costs for the purpose of stifling the claim?

Mr Chong argued that any order for security for costs would stifle the claim. This is what learned counsel said:

> [e] Arbitration
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> The present stage of the arbitration proceeding is that, up-to date, directions have been given on 10 February 1998, directing that the plaintiff and the defendant to deposit a sum of RM150,000 with them in the following manner:

(i) RM30,000 to be paid by 20 February 1998;

(ii) the balance thereof be paid on or before 31 March 1998. Date for parts of claim to be filed.

(iii) to pay in advance a further sum of RM4,000 by 20 February 1998.

[f] The sum of RM200,000 demanded by the plaintiff as security for costs is oppressive, as to try to stifle genuine claim.

[g] The fact that a liquidator — having been appointed by the court — intends to persist with due expedition a claim which, if established, would on the face of it, entitles the company in liquidation to relief and the fact it is that the liquidator who is suing, and not an impecunious company, is another factor to be borne in mind in the exercise of the discretion under s 361 in favour of the defendant in not granting the security for costs: *Spiel v Commodity Brokers Australia Pty Ltd (In Liq)* 8 ACLR 410 and *Re Pavelic Investments Pty Ltd* 8 ACLR 417.

[h] As the defendant's company is in receivership, it is unable to control its own finance and that an order for security for costs would almost certainly bring its claim to an abrupt and final end. On consideration of what is just and reasonable, the fact was that an order for security for costs would have produced victory for the plaintiff without a contest. The defendant would have been prevented from proceeding with its legitimate claim in the arbitration proceedings. An order for security, if granted, would cause greater hardship to the defendant, than would the possibility that the plaintiff would not be able to collect costs.

As for *Spiel v Commodity Brokers Australia Pty Ltd (in liq)*, I have earlier reproduced the passages of the judgment relied on by Mr Chong as supporting his contention that an order for security for costs would result in stifling the claim of the respondent. The facts of that case are these. The company in liquidation was before its liquidation in the business of a broker in commodities and futures contracts and had as its client a defendant who during the period 28 November 1979 to 30 April 1980 traded in commodities and futures contracts as a result of which the company made payments on behalf of the defendant. An amount of $23,306.44 was claimed to be owing by the defendant as on 23 April 1980. The defence was that he had instructed all contracts to be closed on 4 January 1980 and therefore he did not owe the amount. This defendant held a debenture under which the company owed him a certain sum. The defendant appointed a receiver and manager under the debenture who then realized the assets of the company and disbursed the proceeds towards payment of the debt due under the debenture and towards payment of other debts. A debt of $47,878 remained due to the unsecured debtors. The liquidator issued a circular to all the unsecured creditors asking them to make contributions to fund the litigation against the defendant and the liquidator had obtained legal advice to launch the action. The directors of the company prepared a statement of affairs of the company showing the assets and liabilities. The court there found that there was an arguable case for the action against the defendant and refused the application for security for costs.

In the present case, the respondent was on 3 October 1996 wound up as a result of a petition by its shareholder or contributor Sami Mousawi

Associates (M) Sdn Bhd, and on the grounds: (1) the respondent had defaulted in lodging the statutory report or holding the statutory meeting; (2) the respondent did not commence business within a year of its incorporation or suspended its business for a whole year; (3) the respondent is unable to pay its debt; and (4) that it was just and equitable to do so. There is no evidence of the state of affairs of the respondent, particularly regarding its assets and liabilities. There is also no evidence that the shareholders of the respondent had been approached to fund the launching of the legal action. There is also no evidence as to the debt owing by the respondent which it was unable to pay. Lastly, the pressent case does not have the label of a good arguable case. Those are the dissimilarities between the facts of the present case and those of *Spiel v Commodity Brokers Australia Pty Ltd (in liq)*.

Therefore, I am of the view that the respondent had not produced evidence to show that the contributors or shareholders of the respondent, who stand to benefit if the action is successful, are financially not able to fund the action or are reluctant to provide the fund for the security for costs. It must not be forgotten that they, the contributors or shareholders, stand to benefit if the action is successful while remaining unaffected by the consequence of a failed action. On the other hand, the applicant would not be able to recover any cost if the action should fail. Furthermore, fund was procured on behalf of the respondent for the payment of the deposit for the fees for the arbitrators. Thus, I am unconvinced that an order for security for costs will have the effect of stifling the action. Those facts also constitute the 'special circumstances' referred to in *Re Pavelic* justifying the making of an order for security for costs.

Whether the applicant was responsible for the impecuniosity of the respondent?

I have earlier adverted to the grounds for the winding-up of the respondent, one of which was the inability to pay its debts. However, there is no evidence, as I have also earlier said, as to the state of affairs of the respondent, particularly as regards its debt. Since the amount of the debt is unknown, I cannot see how it can be argued that it was because the applicant did not pay the respondent the RM17m or any part thereof that the respondent was not able to pay its debt. It must be borne in mind that the debt could very well under s 218(2)(a) of the Companies Act 1965, be only RM501 and it could very well had arisen at a time when the respondent had the money but for unexplained reasons did not satisfy its debts. In any event, as mentioned earlier, no statement of affairs had been produced to show how it can be said that the applicant was responsible for the impecuniosity of the respondent.

Conclusion

For the reasons stated above, I am of the view that there should be security for costs. As for the amount, it is relevant to take into consideration the fact the retainer fee for the arbitrators is the sum of RM150,000 which the parties have to contribute equally to the arbitrators. This means the cost to

the applicant would be RM75,000. A further fee of RM12,000 per day is payable. Since the issues for arbitration are not that many, it should not take considerable time to complete the arbitration. Therefore, even assuming that the arbitrators do not employ information technology, I would expect them to employ the use of secretaries to take down the notes of evidence and if this is done, I do not think the case should take more than 20 days which would mean a fee of RM240,000. Half of that would be RM120,000 and when this is added to the sum of RM75,000 the applicant could be out of pocket in the sum of RM195,000. This sum does not take into account the out of pocket expenses, like hotel accommodation, which the parties will have to disburse the arbitrators and a conservative sum of RM10,000 would be required and half of that means RM5,000. Therefore, a sum of RM200,000 for security for costs must be provided by the respondent which shall be in the form of cash to be paid into the Registry of the High Court, Kuching, within 45 days from the date of this order. There will, however, be liberty to apply regarding any other form of security which any party may desire in place of the cash payment of RM200,000. Costs to the applicant.

Application allowed with costs.

Reported by Tan Cheng Siong